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In the

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1032

TOWN OF FRANKLIN, ANTHONY CARBONI, TOWN OF SALEM AND ELMER P. CHAPPELL (together with all other duly constituted towns of the State of Connecticut for which permission to intervene was requested, and their respective First Selectman),

Appellants

vs.

OLIVER BUTTERWORTH, MIRIAM BUTTERWORTH, S. RAINS WALLACE, ROBERT BEACH, CHARLES JACOBSON, DAVID S. MACLAY, BRADLEY MOREHOUSE, JOHN NORMAN, GEORGE LUCAS AND ALBERT E. HOLLAND,

Appellees

On Appeal from the United States District Court for the District of Connecticut

MOTION TO AFFIRM

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MOTION TO AFFIRM

Appellees in the above-entitled case move to affirm on the ground that the question presented is so unsubstantial as not to require further argument.

STATEMENT

The complaint in this case was filed by the ten plaintiffs on December 27, 1962. The case was heard by a three-judge Court on October 22, 1963. On February 10, 1964, the Court filed memoranda of decision holding that both houses of the Connecticut General Assembly were districted or apportioned in such a manner as to deny the plaintiffs the equal protection of the laws under the Fourteenth Amendment. In the memorandum of the Court, counsel were instructed to submit proposed forms of decree by March 2, 1964, with a hearing upon such proposed forms of decree scheduled for March 16, 1964.

At all times after the filing of the complaint, the case was widely reported in the Connecticut press, and the issues involved were fully set forth.

At the hearing on October 22, 1963, the Attorney General of Connecticut made plain to the Court that he would not defend the constitutionality of the Connecticut system of districting and apportionment in either house of the General Assembly.

On March 9, 1964, four weeks after the decision of the Court, and one week before the hearing on the form of decree, the appellants filed a motion to intervene. The pleading upon which their motion was based was a motion to postpone the hearing until counsel for the proposed intervenors had had additional time "to give adequate consideration to the several questions presented by this action." A brief was filed on behalf of the proposed intervenors on March 13, 1964, and was first seen by counsel for the appellees on the morning of the hearing, March 16, 1964.

At the hearing, the appellees raised no objection to the suggestion that the proposed intervenors be allowed to file a brief *amicus*. This procedure was permitted by the lower Court.

The appellees have no objection to permitting the proposed intervenors to file a brief *amicus* in this Court and, if the Court deems it helpful, to be heard in oral argument.

In the appellants' Statement of the Case, the plaintiffs are described as "ten individuals from six different urban towns." The appellees profess ignorance as to what constitutes an "urban town". The appellees are residents of six different towns in Connecticut and alleged in the complaint that the system of apportionment in Connecticut diluted their votes for representatives in the Connecticut House and Senate.

Aside from the matters set forth above, the appellees accept the appellants' Statement of the Case.

THE QUESTION PRESENTED IS FRIVOLOUS

The District Court decided in this case that the Connecticut towns were in effect election districts for the purpose of this suit and that therefore they had no right to intervene as necessary parties. Since the motion was untimely, it was denied. Even Judge Anderson, who dissented, would only have allowed individual electors, or a representative sampling of them, to intervene: he was clearly troubled by the problem of the standing of the towns, *qua* towns, to intervene as parties. The majority of the Court found that the small-town voters were ably and articulately represented by the Pinney intervenors (who had made timely motions to intervene at an early stage in the proceedings) and had in fact been bearing the burden of the defense in the suit, in so far as representation in the House was concerned.

Appellants cite a number of cases for the proposition that Connecticut towns have the right to sue and be sued, as well as other similar rights under Connecticut law, but these cases are, of course, aside from the point: the question is not whether the towns may sue to vindicate a right which they admittedly possess, but whether they possess any right in the first instance.

In other words, the sole question is whether, for purposes of this suit, the towns rather than the citizens are the entity represented in the Connecticut House or whether the towns simply constitute election districts. Upon this point, the appellants cite neither case nor history, and indeed appellees know of none. Appellants' only authority for the proposition that towns in Connecticut are for these purposes something more than election districts is a phrase in the Connecticut Constitution to the effect that every town shall be entitled to send one or more representatives to the House. Of course, this phrase can equally easily be construed as a short-hand method of describing the election districts.

Article I, Section 2 of the Connecticut Constitution states plainly: "That all political power is inherent in the people, and all free governments are founded on their authority and instituted for their benefit . . ." That the citizens of towns, and not towns *qua* towns, are represented in the House is bolstered by the language of Article Third, Sections 7 and 8, where it clearly appears that the electors in the town are the group which choose the representatives and not the town itself.

If, as the appellants allege, the Connecticut towns are indispensable parties, in the sense that the towns, rather than the voters in them, may be bound by the judgment in this case, it would appear to follow that, with respect to the Connecticut House, individual voters, such as the appellees, have no right or standing to bring an action to vindicate their rights as voters under the Constitution and laws of the United States. For such rights, under the appellants' theory, reside in the town and not in the individual voter. This conclusion flies in the face of a long line of decisions of this Court, where individual voters have been held to have standing. The most recent of such cases is, of course, *Baker* vs. *Carr*, 369 U.S. 186 (1962).

Moreover, municipal corporations have regularly been denied standing in the federal courts to attack state legislation as

violative of the Federal Constitution. See, *e.g.*, *Pawhuska* vs. *Pawhuska Oil & Gas Co.*, 250 U.S. 394 (1919); *Trenton* vs. *New Jersey*, 262 U.S. 182 (1923); *Williams* vs. *Mayor of Baltimore*, 289 U.S. 36 (1933). And, the right claimed by the proposed intervenors, if it is not an exclusive right of the towns, must be one representative of the rights of voters. In that posture, the rule of *Massachusetts* vs. *Mellon*, that it is no part of a state's duty or power to enforce the rights of its citizens in respect to their relations with the federal government, precludes intervention of the towns in this suit. 262 U.S. 447, 485, 486 (1923).

In short, the claim that the right to send representatives to the Connecticut lower House is lodged in the towns themselves, rather than in the voters of the towns, while ingenious, can find no support in Connecticut practice or Connecticut law. It flies in the face of certain well established federal jurisdictional principles relating to standing. And it would, in the last analysis, effectively negate this Court's holding in *Baker* vs. *Carr*.

For these reasons, the appellees believe that the claim is frivolous. They therefore move this Court to affirm the decision of the District Court.

Respectfully submitted,

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Appendix A

Constitution of the State of Connecticut, Article First, Section Two

That all political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit; and that they have at all times an undeniable and indefeasible right to alter their form of government in such manner as they may think expedient.

Constitution of the State of Connecticut, Article Third, Sections Seven and Eight

Sec. 7. A general election for members of the general assembly shall be held on Tuesday after the first Monday of November, biennially, in the even-numbered years. The general assembly shall have power to enact laws regulating and prescribing the order and manner of voting of said members, and also providing for the election of representatives at some time subsequent to the Tuesday after the first Monday of November in all cases when it shall so happen that the electors in any town shall fail on that day to elect the representative or representatives to which such town shall be by law entitled.

Sec. 8. At all elections for members of the general assembly the presiding officers in the several towns shall receive the votes of the electors, and count and declare them in open meeting. The presiding officers shall also make duplicate lists of the persons voted for, and of the number of votes for each, which shall be certified by the presiding officers; one of which lists shall be delivered to the town clerk, and the other within ten days after said meeting, shall be delivered under seal, either to the secretary, or to the sheriff of the county in which said town is situated; which list shall be directed to the secretary, with a

superscription expressing the purport of the contents thereof. And each sheriff who shall receive such votes, shall, within fifteen days after said meeting, deliver, or cause them to be delivered to the secretary.